Supreme Court, U.S.
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No. 01-893

IN THE

# Supreme Court of the United States

HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA,

*Petitioner,*

*v.*

CITY OF NAPA, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, STATE OF CALIFORNIA

## BRIEF IN OPPOSITION FOR RESPONDENTS NAPA VALLEY COMMUNITY HOUSING, *et al.*

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## QUESTIONS PRESENTED

1. Whether Petitioner's facial challenge under the Takings Clause to an ordinance requiring that a small percentage of the units in new residential developments be used for housing affordable to low- and moderate-income persons is ripe for review, when (a) the complaint does not contain a single allegation regarding the economic impact of the challenged ordinance on the property of Petitioner or its members; (b) the record contains no information regarding the application or impact of the ordinance; (c) the ordinance contains a host of provisions that mitigate or eliminate any adverse impact on individual developers; and (d) Petitioner complains that the City has failed to show that a "rough proportionality" exists between the ordinance and the adverse impact which new residential developments have on the City's supply of affordable housing.

2. Whether the "rough proportionality" requirement imposed on individualized exactions of property under *Dolan v. City of Tigard*, 512 U.S. 374 (1994), applies to an ordinance requiring that a small percentage of the units in new residential developments be affordable to low- and moderate-income persons, where the ordinance does not take any property interest from the developers or require developers to dedicate any property but merely limits the use of a small percentage of their property.

## RULE 29.6 STATEMENT

The list of parties contained in the petition for certiorari is correct. The entity Respondents (Napa Valley Community Housing, a California nonprofit corporation; Non-Profit Housing Association of Northern California, an unincorporated association; and Housing California, a California nonprofit corporation) do not have any parent corporations. There are no publicly traded corporations that own 10% or more of the stock of these non-profit corporations.

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## INTRODUCTION

The City of Napa, California (the "City") adopted an ordinance (the "Ordinance") that requires the developers of new residential housing to devote 10% of their units to meet the housing needs of low- and moderate-income individuals and families. The Ordinance was enacted in response to a grave shortage of affordable housing that has already caused severe personal hardship to numerous City residents and that could lead in the future to diminished economic growth within the City.

Petitioner contends, *inter alia*, that the Ordinance is unconstitutional on its face under the Takings Clause. But the Takings Clause allegations in Petitioner's complaint do not contend that the Ordinance has been or will be unconstitutionally applied; that it has deprived or will deprive Petitioner or its members of a fair return on their investments; or that it will deprive Petitioner or its members of all economic use of their properties. Indeed, Petitioner's Takings Clause claim does not contain so much as *a single allegation* concerning the economic impact of the Ordinance. Instead, Petitioner's challenge under the Takings Clause is based wholly on its claim that the City has failed to show that a "rough proportionality" exists between the City's lack of affordable housing and the construction of new houses.

The California courts properly rejected this novel and untenable claim, and there is no reason why this Court should review their decision. The Court has long recognized that claims under the Takings Clause are best adjudicated in the context of a record that shows the specific burden which the challenged statute or ordinance imposes on the claimant. Yet Petitioner's complaint in this case contains no such facts.

Accordingly, this case is indistinguishable from *Pennell v. City of San Jose*, 485 U.S. 1 (1988), where the Court refused to consider a takings claim that is constitutionally identical to the claim presented here.

For that reason alone, the Court should deny the petition. If the Court wishes to review the propriety of ordinances similar to the one challenged here, it should await a case with a factual record that fully describes the actual operation of the ordinance and, in particular, its adverse economic impact, if any, on the parties seeking relief. *See* Part I, *infra*.

Even if this case were ripe for review, Petitioner's Takings Clause claim is meritless under well-settled principles. Although a facial challenge requires a showing that the challenged statute or ordinance can never be constitutionally applied, Petitioner's complaint contains no such allegation. And while Petitioner contends that the City has failed to show that a "rough proportionality" exists between the development of new residential housing and the lack of affordable housing within the City, the "rough proportionality" requirement established by *Dolan v. City of Tigard*, 512 U.S. 374 (1994), does not apply to this case. This Court's decision in *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999), which Petitioner does not cite, recognized that heightened scrutiny under *Dolan* does not apply outside the "special context" of land dedication requirements. This limitation makes perfect sense. *Dolan* applies only when a public entity requires the dedication of land, and the requirement would constitute a taking if it were not imposed as a condition for obtaining a governmental permit or benefit. However, the Ordinance does not meet this threshold requirement. It does not require a property owner to dedicate land but only to use a small percentage of

its property in a particular manner. The developer is free to own, sell or jointly develop the affordable units that constitute the required use. Moreover, *Dolan*'s "rough proportionality" requirement does not apply to facial challenges; until a land use regulation has been applied to a specific landowner, there is no "proportionality" to measure. *See* Part II, *infra*.

The Ordinance is no different constitutionally from any other zoning legislation that restricts the use of particular property, but nevertheless leaves the property owner free to use that property profitably. Indeed, the Ordinance is even less restrictive than a zoning requirement that prevents a property owner from using its property to maximize economic return. The Ordinance affects only 10% of a developer's residential units, while zoning requirements commonly regulate use of the entire property. In short, Petitioner's challenge to the Ordinance raises no novel issues of law, but is instead barred by long-standing precedent that this Court should not disturb.

## STATEMENT OF THE CASE

The California Legislature has found "that there exists a severe shortage of affordable housing, especially for persons and families of low and moderate income. . . ." CAL. GOV'T CODE § 65913(a). This shortage is particularly severe in the City of Napa. The Association of Bay Area Governments has calculated that the City's share of the regional need for new housing over the next five years is approximately 3,000 units, of which nearly 1,000 units will be needed to house low-income and very-low-income families. JA 45-46.[1]

1. "JA" refers to the parties' Joint Appendix in Lieu of Clerk's Transcript, filed in the California Court of Appeal.

Yet only eighty-six new apartment units were built in the City between 1992 and 1997. JA 44.

In the spring of 1999, a survey of nearly a fifth of the City's rental units found that the City's vacancy rate was slightly over two-tenths of one per cent (0.2%). JA 794. Most of the residential housing development in recent years has been high-end luxury homes. This high-end development provides housing for relatively few families per acre (four or five, as opposed to up to twenty for multifamily development), uses up the dwindling inventory of land available to meet the City's affordable housing needs and fails to provide housing affordable to most Napa residents. JA 356, 550, 686, 794. Not only are new affordable units not being built, existing rental units are being converted to other uses. JA 356, 794. In addition, a recently enacted flood-control measure is likely to result in the loss of hundreds of additional units, mostly in low-rent but substandard buildings that have been subject to recurrent flooding. JA 794.

The demand for affordable housing in the City far outstrips the supply. The City's Housing Authority has a waiting list of over 1,000 households for its affordable housing and housing subsidy programs. JA 795. Respondent Napa Valley Community Housing ("NVCH") has a waiting list of approximately two hundred households for its current affordable housing units. JA 799. When NVCH completed its most recent affordable housing complex in the City of Napa, offering thirty-nine units for rent, it received 525 applications. JA 799. Until an adequate supply of affordable housing becomes available, many low-income individuals and families will continue to pay a disproportionate share of their meager earnings for rent, live in substandard conditions, move in with friends or relatives (who, of course, may not

always be available or willing to help) or sleep on the streets or in homeless shelters.

The lack of affordable housing has created economic and environmental problems for the entire City, in addition to the hardship it has imposed on low-income individuals and families. Lower income families who work in the City are increasingly forced to live at greater distances from their places of employment, which increases traffic congestion and pollution. Moreover, if not remedied, the lack of affordable housing will ultimately lead to a shortage of jobs and decreased economic growth. JA 686, 737, 739.

The Ordinance represents a reasonable accommodation between the City's need for affordable housing and the interests of private developers. As the California Court of Appeal noted, it was based on the recommendations of the "Napa Affordable Housing Task Force" "that included representatives from non-profit agencies, environmental groups, religious institutions, local industries, for-profit developers, and the local chamber of commerce" (Pet. App. A-2), including a representative of the Napa County Board of Realtors. JA 218, 236.

The primary mandate imposed by the Ordinance is a requirement that developers of ten or more residential units make 10% of those units affordable to households of lower incomes. Municipal Code § 15.94.050(A), Pet. App. G-29. Thus, 90% of a developer's units are not affected by the Ordinance in any way. Moreover, the Ordinance includes a host of benefits that may substantially alleviate the purported cost of compliance:

- Applications for developments that include affordable housing receive expedited consideration before other residential land use applications. Municipal Code § 15.94.050(F)(1)(b), Pet. App. G-33 to G-34. Faster processing of development applications can save developers considerable money, since it reduces the time they have to carry financing on the land prior to development, and thus reduces their interest and other financing costs.[2]

- The City Council may provide density bonuses (or other incentives of equal financial value) that would not be available under state law. Under California law, a developer who agrees to construct 20% of its units for low-income households (or 10% for very-low-income households) is entitled to a "density bonus" of at least 25% more units than "the otherwise maximum allowable residential density under the applicable zoning ordinance. . . ." CAL. GOV'T CODE § 65915(a), (f). Under the Ordinance, however, density bonuses are available to projects where only 10% of the units have been designated for low-income tenants. Municipal Code § 15.94.050(F)(2)(a), Pet. App. G-34. Because density bonuses permit developers to sell additional houses with only minimal incremental costs for land

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2. Petitioner errs in asserting that the incentives contained in the Ordinance are available only to developers that "exceed" its requirements. Pet. 5. The Ordinance plainly makes all the "concessions or incentives" listed in subsection (F) applicable to all "residential development projects which *meet* the requirements" contained in subsection (A), which imposes the affordable housing mandate. Municipal Code § 15.94.050(F)(1), Pet. App. G-33 (emphasis added).

and improvements, the availability of density bonuses can substantially mitigate or eliminate any economic burden caused by affordable housing mandates.

- The City may waive or modify City standards in order to reduce total project costs upon a showing by the developer that the modification is necessary for the feasibility of the residential development project. Municipal Code § 15.94.050(F)(2)(b), Pet. App. G-34.

- The City may provide direct financial assistance in the form of a loan or a grant. Municipal Code § 15.94.050(F)(2)(c), Pet. App. G-34.

- The City may forgive all or a portion of the 10% requirement upon a showing that imposition of the requirement will cause "undue hardship" and that the project will contribute significantly to affordable housing within the City. Municipal Code § 15.94.050(G)(2), Pet. App. G-35.

- A developer may appeal to the City Council "for a reduction, adjustment or waiver" of the affordable housing requirement "based upon the absence of any reasonable relationship or nexus between the impact of the development and . . . the inclusionary requirement." Municipal Code § 15.94.080(A), Pet. App. G-40.

Moreover, the Ordinance provides two alternative means by which the developers of single-family housing may meet the 10% requirement as of right, either by submitting an

"alternative equivalent proposal," including a dedication of land or the construction of affordable units on another site, or by paying an "in-lieu fee," based upon the construction costs of market rate dwelling units. Municipal Code § 15.94.050(B),(C), Pet. App. G-30 to G-32. Developers of multifamily housing may propose to meet their inclusionary zoning requirements by either of these methods, subject to discretionary approval by the City Council. *Id.*

Because this lawsuit has been brought as a facial challenge, there is nothing in the record showing how the Ordinance has been applied to any particular development. Indeed, as noted above, the complaint contains *no* allegations at all regarding the economic impact of the Ordinance on Petitioner, its members or anyone else.

Instead, Petitioner contends that the mere enactment of the Ordinance has somehow violated the constitutional rights of it and its members. Petitioner thus contends that a court may hold the Ordinance unconstitutional under the Takings Clause in the abstract, without waiting for a concrete case involving its application to specific property. The California courts properly held that these claims did not state a cause of action, and Petitioner has shown no reason why this Court should review that decision.[3]

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3. The argument that follows addresses only Petitioner's claim under the Takings Clause. With respect to Petitioner's other contentions, the Respondents filing this brief (who intervened to defend the Ordinance in the trial court) adopt the arguments set forth in the City's Brief in Opposition.

## REASONS FOR DENYING THE WRIT

### I.

### PETITIONER'S TAKINGS CLAUSE CLAIM IS NOT RIPE FOR REVIEW BECAUSE PETITIONER HAS NOT ALLEGED THAT THE CHALLENGED ORDINANCE HAS OR WILL HAVE ANY ADVERSE ECONOMIC IMPACT ON IT OR ITS MEMBERS.

The state courts which adjudicated Petitioner's claims under the Takings Clause were of course not bound by the limits imposed on constitutional adjudication in the federal courts. Consequently, they did not need to follow this Court's "oft-repeated admonition that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-95 (1981) ("*Hodel*"). However, this rule binds this Court, and applies when a petitioner seeks review of a state court decision under 28 U.S.C. § 1257(a).[4]

"Adherence to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property." *Hodel*, 452 U.S. at 295; *accord Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988). That is because "no precise rule determines when property has been taken." *Agins v. City of Tiburon*, 447 U.S. 255, 260-61 (1980). Instead, "the question necessarily requires a weighing of private and public interests." *Id.* at 261.

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4. An exception to this rule applies when a state court adjudicating a constitutional claim issues relief that gives the state court defendant standing to seek review in federal court. *See, e.g., Asarco, Inc. v. Kadish*, 490 U.S. 605, 617-19 (1989). But that obviously did not happen here.

The weight of the "private interest" depends in large part on the economic impact of the challenged legislation. The "test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property. . . ." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987) ("*Keystone*"); *see Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("[o]ne fact for consideration in determining [whether the Takings Clause has been violated] is the extent of the diminution"). Consequently, whether there has been a violation of the Takings Clause "depends upon the particular facts." 260 U.S. at 413. Thus, the Court has summarized its Taking Clause jurisprudence as follows:

> [T]his Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as *the economic impact of the regulation, its interference with reasonable investment backed expectations*, and the character of the government action—that have particular significance. (*Keystone*, 480 U.S. at 494 (quoting *Hodel*, 452 U.S. at 295-96) (citations omitted; emphasis added))

*Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), illustrates the importance of these factors in resolving claims under the Takings Clause. In that

case, the plaintiffs, who owned Grand Central Terminal in New York City, contended that the city had "taken" their property when it denied them permission to construct a fifty-three-story building on top of the Terminal. In rejecting plaintiffs' claim, the Court first emphasized that the city had not prohibited *all* construction over the Terminal, but only construction over fifty stories, and that it might approve a smaller building that "harmonized" better with the Terminal. *Id.* at 137. But the Court then went on to say that, even if the plaintiffs had been totally prohibited from building above the Terminal, the city had given them "transferable development rights" which might permit them to build elsewhere, and that the value of these rights had to be taken into account when adjudicating plaintiffs' takings claim:

> [T]o the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied *all* use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. Although appellants and others have argued that New York City's transferable development-rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, *are to be taken*

> *into account in considering the impact of regulation*. (*Id.* at 137 (footnote omitted and second emphasis added))

In this case, however, the record contains nothing regarding two of the key factors identified in *Keystone* and *Hodel* as necessary for analysis of claims under the Takings Clause: "the economic impact of the regulation" and "its interference with reasonable investment backed expectations." Indeed, as noted above, Petitioner's complaint does not contain a single allegation regarding the economic impact of the Ordinance it seeks to challenge, much less information regarding the degree to which the Ordinance interferes with "reasonable investment backed expectations." Instead, Petitioner's challenge is wholly abstract, brought before there had even been a single application of the ordinance it asserts to have violated its constitutional rights.

*Pennell v. City of San Jose*, 485 U.S. 1 (1988), compels rejection of this challenge. There the plaintiffs contended that a provision in a rent control ordinance permitting a hearing officer to lower an otherwise reasonable rent based on "economic and financial hardship" to the property's tenants violated the Takings Clause. *See id.* at 4, 9. Like the Ordinance, the "tenant hardship" provision in *Pennell* had not been applied before the lawsuit was filed; moreover, that provision did not impose a mandatory duty on the part of the hearing officer to lower rents, but only required the officer to "consider" the hardship that a prospective rent increase might impose on the tenant. The Court found the action premature:

> [T]he mere fact that a hearing officer is enjoined to consider hardship to a tenant in fixing a

> landlord's rent, *without any showing in a particular case as to the consequences of that injunction in the ultimate determination of the rent*, does not present a sufficiently concrete factual setting for the adjudication of the takings claim appellants raise here. (*Id.* at 10 (emphasis added)).

Petitioner's claim is no more concrete than the claim rejected in *Pennell*. The provisions of the rent control ordinance challenged in that case gave the hearing officer discretion to determine in individual situations how the "tenant hardship" provision would be applied. *See* 485 U.S. at 10. Similarly, the provisions of the Ordinance give the City administrative discretion to avoid even a potential claim that the Ordinance is being applied unconstitutionally, as well as a variety of tools to modify application of the Ordinance in appropriate cases without having to exempt a piece of property totally. Thus, if the City believes that application of the Ordinance to a particular residential development might raise constitutional questions, or is simply unreasonable under the circumstances, it can take a number of steps to reduce the Ordinance's economic impact: provide additional density bonuses, waive or modify municipal requirements to reduce project costs, forgive all or a portion of the 10% requirement or even provide "direct financial assistance in the form of a loan or grant." *See* pp. 6-7, *supra*. The existence of such discretion under the Ordinance precludes Petitioner from challenging it under the Takings Clause before it has been applied to *any* specific property.[5]

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5. Petitioner improperly frames the ripeness issue as solely dependent on the waiver provision. Pet. 21-25. Not so. The Ordinance (Cont'd)

The nature of Petitioner's Takings Clause claim also precludes a facial challenge. Petitioner contends that *Dolan v. City of Tigard*, 512 U.S. 374 (1994), requires "some 'rough proportionality' between an exaction and the adverse impact caused by the use of the underlying property. . . ." Pet. 10. But the "rough proportionality" purportedly required by *Dolan* cannot be measured outside the context of a specific

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(Cont'd)
does not require the City either to apply the Ordinance with full force to a particular development or to give the property a blanket exemption from the Ordinance's requirements. Instead, as discussed above, the Ordinance gives the City a wide array of choices in determining how to apply the Ordinance to any particular developer. *See* pp. 6-7, *supra*.

The cases cited by Petitioner that have adjudicated facial challenges under the Takings Clause (Pet. 24) all involved situations where the record contained evidence of the economic impact of the challenged regulation. In *Keystone*, for example, there was a stipulation that the challenged regulation would "require petitioners to leave approximately 27 million tons of coal in place." 480 U.S. at 498. In *Hodel*, the Court rejected the plaintiffs' facial challenge under the Takings Clause because the record indicated that enactment of the challenged statute did not deprive plaintiffs "of economically viable use of their property." 452 U.S. at 297. The "bill" in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), similarly contained detailed allegations concerning the alleged effect of the challenged zoning ordinance on the plaintiff's property. *See id.* at 384 (zoning alleged to decrease market value of property from $10,000 to $2,500 per acre). And in *Beacon Hill Farm Associates II Ltd. Partnership v. Loudoun County Board of Supervisors*, 875 F.2d 1081 (4th Cir. 1989), the plaintiff alleged that enactment of the challenged ordinance had caused it damages in excess of $22 million. *Id.* at 1082. No such allegations are found in Petitioner's complaint.

application. In a facial challenge, there is simply no "proportionality" to measure.[6]

Indeed, the ameliorative provisions of the Ordinance provide a complete answer to Petitioner's *Dolan* claim. The Ordinance permits a developer to seek a modification

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6. As Judge Brunetti of the Ninth Circuit has explained:

> The *Dolan* analysis cannot be applied in facial takings cases. "A facial challenge involves a claim that the mere enactment of a statute constitutes a taking, while an as-applied challenge involves a claim that the particular impact of a government action on a specific piece of property requires the payment of just compensation." In *Dolan*, the Court analyzed whether the government's exaction was too costly. However, in a facial claim, the court does not analyze the exaction at all. (*Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998) (citation omitted))

While the concurring Judge in *Garneau* did not sign the quoted opinion, he agreed "that the facts of the case at bar are not amenable to an analysis under the just compensation clause, much less the 'individualized determination' required by *Dolan*." *See* 147 F.3d at 820 (Williams, J., concurring) (footnote omitted).

In *Yee v. City of Escondido*, 503 U.S. 519 (1992), the Court held that petitioners could bring a facial challenge under the Takings Clause to a mobile home rent control ordinance without seeking a rent increase if their theory of liability did "not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property. . . ." *Id.* at 534. But there was no claim in that case that the "rough proportionality" required by *Dolan* had not been established; indeed, *Yee* was decided two years before *Dolan*. It therefore does not provide authority for a facial challenge in this case.

of its requirements "based upon the absence of any reasonable relationship or nexus between the impact of the development and either the amount of the fee charged or the inclusionary requirement." Municipal Code § 15.94.080(A), Pet. App. G-40. Thus, should the City apply the Ordinance only in circumstances where a nexus exists between the burdens it imposes on the *individual* development and that development's individualized impact on affordable housing, Petitioner's complaint that the Ordinance was adopted without a *generalized* finding of such a nexus will be moot. Petitioner's claim of "lack of proportionality" is thus (at best) woefully premature.

## II.

## THE "ROUGH PROPORTIONALITY" REQUIRED BY *DOLAN* WHEN A CITY EXACTS PROPERTY BY MEANS OF AN INDIVIDUALIZED ADJUDICATORY AND DISCRETIONARY EXERCISE OF THE POLICE POWER DOES NOT APPLY TO AN ORDINANCE THAT DOES NOT EXACT PROPERTY AND WHICH WAS IMPOSED LEGISLATIVELY ON THE CLASS OF ALL RESIDENTIAL DEVELOPERS.

"A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Petitioner cannot make such a showing; indeed, its complaint does not even allege that the Ordinance cannot be constitutionally applied.

The only Takings Clause claim discussed in the petition is the assertion that the City has failed to show that a "rough

proportionality" exists between the availability of affordable housing within the City and the construction of market-rate housing. But this Court has "not extended the rough-proportionality test of *Dolan* beyond the special context of exactions — land use decisions conditioning approval of development on the dedication of property to public use." *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 702 (1999). That is so for good reason. Before "heightened scrutiny" applies, the government must take *property*. Indeed, the requirements imposed by *Dolan* and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), exist to prevent the government from achieving indirectly through a permit condition what it could not achieve directly without paying just compensation. *See, e.g.*, *Nollan*, 483 U.S. at 834 ("Given . . . that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land-use permit alters the outcome"); *Dolan*, 512 U.S. at 384 ("Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred"). This logic does not apply where there has been no exaction.[7]

This case proves the point. The Ordinance does not require the dedication of property. *A fortiori*, no dedication has been imposed to achieve an unconstitutional purpose. Accordingly, Petitioner cannot claim that the City is using the permit power to achieve indirectly what it could not

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7. This brief does not discuss Petitioner's claim that a conflict exists with respect to the applicability of *Nollan* and *Dolan* to this case. Instead, we adopt the City's submission on this issue.

constitutionally do directly without the payment of just compensation.

At most, the Ordinance might cause developers of property in the City to receive somewhat less revenue for developing 10% of their units than they might otherwise have received had the Ordinance not been enacted — though even that is unclear and Petitioner has made no such allegation. Indeed, there is every reason to believe that whatever financial detriment is caused by the City's affordable housing mandate is more than compensated for by increased density bonuses and the other benefits available under the Ordinance. But even if it exists, this hypothetical decrease in future lost revenue is not a discrete piece of property that the City has exacted. Instead, it is no different for constitutional purposes than the economic impact caused by any other form of land use legislation, such as minimum acre restrictions, set-back requirements, or other restrictions on use. Where, as in this case, the City has not required the physical conveyance of property, *Nollan* and *Dolan* are not applicable.

Moreover, *Dolan*'s "rough proportionality" requirement applies only where a city makes a discretionary, individualized, adjudicatory decision to impose unconstitutional conditions upon a single landowner. It does not apply when a city makes a *legislative* decision to enact an ordinance on a broad class of property owners. Indeed, neither of this Court's cases that apply "heightened scrutiny" invalidated an ordinance on its face. *Nollan* did not invalidate the California Coastal Act's statutory public access requirements (*see* CAL. PUB. RES. CODE § 30212), but only the use of that act to require the Nollans to grant an easement across their property as a condition of securing a permit to rebuild their house. *See Nollan*, 483 U.S. at 841-42. Nor did

*Dolan* hold the relevant state and municipal land use statutes and ordinances (*see* 512 U.S. at 377-79) facially unconstitutional because they did not require "rough proportionality." Instead, the Court held that the city could not rely on those laws to require a particular landowner to dedicate a floodplain easement as a condition of building a larger store on her property because the city had failed to make "some sort of *individualized* determination that the required dedication is related both in nature and extent to the impact *of the proposed development*." *Id.* at 391 (footnote omitted and emphases added). Similarly, when the city in *Dolan* attempted to require a landowner to dedicate property for a pedestrian/bicycle pathway, the Court held that it had to "quantify its findings in support of the dedication" (*id.* at 395-96), not that it had to amend its zoning ordinances to require some sort of general proportionality.

But even if this case somehow involved the taking of property (which it does not), and even if *Nollan* and *Dolan* could be invoked in a facial challenge to the mere enactment of legislation (which they cannot), "heightened scrutiny" under *Nollan* and *Dolan* does not apply to a law of general application. Unlike the administrative exactions in *Nollan* and *Dolan*, the Ordinance does not impose unique burdens on individual property owners. Instead, it imposes affordable housing requirements on the development of *all* residential and nonresidential property within the City.[8] The discretion it gives the City Council to mitigate the inclusionary zoning mandate is triggered by the developer, not the City; and in

8. Because Petitioner's membership allegedly consists *only* of "builders, contractors, and related trades and professions involved in the residential construction industry" (JA 2), it has no standing in this Court to challenge the constitutionality of the Ordinance as applied to developers of non-residential property.

any event can be exercised only in the developer's favor. Thus, the City has no power to *increase* the burden imposed by its Ordinance in a particular case above the minimum provided in the Ordinance; it can only *decrease* the burden.

*Dolan* and *Nollan* recognized that a city's exercise of discretionary, adjudicatory power over an individual landowner requires special constitutional safeguards. When a city makes a decision that affects only a single property owner, the property owner is uniquely vulnerable to an extortionate use of the police power. In that situation, the local public entity can abuse its permitting authority to exact property, and the affected property owner has no remedy other than to surrender its property, do without the permit or sue.

When a city enacts legislation that affects a broad class of property owners, however, the balance of power is quite different. The fact that a land use regulation applies to "a large number of parcels" "provides assurances against arbitrariness" (*Penn Central*, 438 U.S. at 135 n.32) that do not exist when government exacts property from an individual property owner.[9] That is because property owners

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9. As Justice Jackson stated in *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949):

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick

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as a class have ample political power to protect themselves against arbitrary legislative action that individual landowners do not. Moreover, prospective residents in California pay a disproportionate share of property taxes under Proposition 13 because their assessments are based on acquisition value. *See Nordlinger v. Hahn*, 505 U.S. 1 (1992). Accordingly, cities in California have an interest in promoting development that has no counterpart when a city decides to impose burdens on a single landowner. Indeed, the Ordinance is the result of a legislative exercise in community consensus-building that considered — and, indeed, reflected — the views of *all* segments of the City, including developers. *See* p. 5, *supra*.

For all these reasons, heightened scrutiny is justified only when the government seeks to take *property* through the exercise of a permit condition on an *individual landowner* that it would have to pay for if it took the property directly. That is not true here, where the Ordinance applies to all developers as a class and takes no property from any developer, either directly or indirectly. Thus, even if Petitioner's Takings Clause claim were properly before the Court, the California Court of Appeal's refusal to apply "heightened scrutiny" to this case raises no issue worthy of review.

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> and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation. (*Id.* at 112-13) (Jackson, J., concurring).

## CONCLUSION

For these reasons, and for the reasons set forth in the City of Napa's Brief in Opposition, the petition should be denied.

Respectfully submitted,

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